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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BETTY J. BIRCH,

Petitioner,

v.

JOHN H. LEHMAN, SECRETARY
OF THE UNITED STATES
DEPARTMENT OF NAVY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Is the thirty day statutory time period for filing a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 et seq., a jurisdictional prerequisite to suit by a federal employee or a statute of limitations subject to equitable tolling, waiver and estoppel?

II. 42 U.S.C. § 2000e-16(c) of Title VII of the Civil Rights Act of 1964, as amended, provides that a federal employee may file a civil action in the United States District Court within 30 days following receipt of "Notice of final action" by the Equal Employment Opportunity Commission ("EEOC").

A. Where the EEOC issues a letter denying relief to a federal employee and designates the letter as a

"final decision" but simultaneously advises the employee that she may petition EEOC for a rehearing of the decision, does EEOC's denial of a petition for rehearing, filed within the 30 day period for filing suit, constitute the "final action" within § 2000e-16(c), thus permitting a civil action to be filed within 30 days following the denial of the petition?

B. Does a petition for rehearing filed within the 30 day period for filing a civil action toll the time limit for filing a civil action until the petition is acted upon?

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I. Is the thirty day statutory time period for filing a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 et seq., a jurisdictional prerequisite to suit by a federal employee or a statute of limitations subject to equitable tolling, waiver and estoppel?

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"final decision" but simultaneously advises the employee that she may petition EEOC for a rehearing of the decision, does EEOC's denial of a petition for rehearing, filed within the 30 day period for filing suit, constitute the "final action" within § 2000e-16(c), thus permitting a civil action to be filed within 30 days following the denial of the petition?

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BETTY J. BIRCH,

Petitioner,

vs.

JOHN H. LEHMAN, Secretary of the Department of the Navy,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Betty, J. Birch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered May 5, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ___F.2d___, 28 FEP Cas. 1372. A copy appears in the Appendix at pp. A1-A6. The district court's opinion has not been published, but appears in the Appendix at pp. A8-A14.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1982. A timely petition for rehearing was filed on May 19, 1982 but was denied on June 16, 1982. (App. A7) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The case arises under the provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The petition

specifically involves § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3);

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

and § 717(c) and (d), 42 U.S.C. § 2000e-16(c) and (d):

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit

> referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, . . .an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

STATEMENT OF THE CASE.

Petitioner Betty J. Birch (hereafter "Ms. Birch") is a female citizen of the United States who was employed as a civilian by the United States Department of the Navy (hereafter "the Navy").

She worked as librarian at the Navy Regional Medical Center at Camp Lejeune, North Carolina. During her tenure there, she contends, the Navy denied her equal employment opportunities, harassed and intimidated her and, on December 14, 1976, discharged her because of her sex and in reprisal for her earlier complaints.

Ms. Birch pursued her administrative remedies within the Department of the Navy. In her complaint to the Navy, petitioner raised eight claims of discrimination, including the termination of her employment. On April 23, 1979, the Navy notified Ms. Birch that it accepted three of the issues for further investigation but that it dismissed five (including her termination) without ruling on the merits. Petitioner appealed the dismissal of the five claims

to the Equal Employment Opportunity Commission ("EEOC").

On September 3, 1980,[1/] the Office of Review and Appeals, a division within the EEOC, issued what it termed a "final decision" remanding four of the five issues to the Navy to consider on the merits. (See App. at A18-A26) As for the fifth issue, Ms. Birch's discriminatory termination, the Office of Review and Appeals dismissed her complaint, again not on the merits. The decision informed Ms. Birch that she could file a civil action in federal court within 30 days of her receipt of the decision. In addition, however, immediately following the Notice of her

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1/ The District Court specifically found that Ms. Birch received this decision on October 23, 1980. See App. at A9.

Right to File a Civil Action, the decision contained the following Notice:

NOTICE OF RIGHT TO REQUEST REOPENING

> The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:
>
> 1. New and material evidence is available that was not readily available when the previous decision was issued;
>
> 2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or
>
> 3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners . . .

(App. at A25-26).

On November 20, 1980, within thirty (30) days after receipt of this decision, plaintiff petitioned the full Commission to reopen and reconsider her discrimination complaint. In a decision dated May 18, 1981, the Commission issued a Denial of Request to Reopen. (See App. at A28) Ms. Birch received the Denial on May 21, 1981. The cover letter to the Denial stated, "Enclosed please find the final decision of the Equal Employment Opportunity Commission . . ." (emphasis added). (App. at A27) The Denial also stated that petitioner had "no further right of administrative appeal from a decision of this Commission . . ." (emphasis added) (App. at A31) Consequently, within thirty (30) days after her receipt of the Denial of her Petition for Reopening and Reconsideration,

on June 17, 1981, plaintiff filed this action.

The defendant moved to dismiss plaintiff's suit. On October 22, 1981 the district court entered Judgment granting defendant's motion to dismiss under Rule 12(b)(1), F.R.Civ.P., for want of subject matter jurisdiction. (App. at A15-A16) In its opinion, the district court reasoned that the Office of Review and Appeals decision dated September 3, 1980 was the final decision of the EEOC, and by implication, (1) the May 18, 1981 Denial of Request to Reopen was not a final decision upon receipt of which the plaintiff could, within 30 days, file suit; and (2) the 30 day time limitation could not be tolled since it was a jurisdictional limitation that "may not be disregarded by the Court." (App. at A8-A14)

The Fourth Circuit affirmed the dismissal for want of subject matter jurisdiction. (App. at A1-A6) Petitioner requested rehearing, but the request was denied. (App. at A7)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DECISION HOLDING THAT THE THIRTY DAY TIME PERIOD FOR FILING A CIVIL ACTION IS A JURISDICTIONAL PREREQUISITE TO MAINTENANCE OF A FEDERAL EMPLOYEE'S SUIT UNDER TITLE VII CONFLICTS WITH DECISIONS OF THIS COURT AND CREATES A CONFLICT IN THE CIRCUITS.

A. The Decision of the Court of Appeals for the Fourth Circuit conflicts with the Decisions of this Court in Zipes v. Trans-World Airlines and Mohasco Corp. v. Silver.

The district court dismissed this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), F.R. Civ.P., because the action was not filed within 30 days from what that court determined was the final agency action

within the meaning of § 717(c) of Title VII of the Civil Rights of 1964, as amended. 42 U.S.C. § 2000e-16(c). However, the holding that the 30-day time period stated in § 717(c) is a jurisdictional provision not subject to equitable tolling conflicts with the decisions of this Court in Zipes v. Trans-World Airlines, ___U.S.___, 102 S.Ct. 1127, 71 L.Ed.2d 234 (February 24, 1982) and Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

In Zipes, this Court held that the 180 day time limit for filing a charge with the EEOC contained in § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), is not jurisdictional but rather operates like a statute of limitations subject to waiver, estoppel and equitable tolling. Zipes, 71 L.Ed. at 243. The Court determined that:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. § 2000e-5(e) and (f) does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723, and Senator Case described its purpose as preventing the press of "stale" claims, 110 Cong. Rec. 7243, the end served by a statute of limitations.

71 L.Ed.2d at 243-44. (footnotes omitted). Thus the Zipes court contrasted two statutory provisions of Title VII: first, the provision setting forth time limits for filing a charge of discrimination; and second, the "entirely separate" provision granting district courts subject matter jurisdiction over discrimination suits.

The statutory structure described in Zipes as applicable to private employee suits is exactly paralleled in Title VII's provisions relating to federal employees. First, § 717(c), 42 U.S.C. § 2000e-16(c), sets out time limits for filing charges with a federal agency, filing an appeal to the EEOC from final agency action, and filing a civil action. Second, §§ 717(c) and (d), 42 U.S.C. §§ 2000e-16(c) and (d), incorporate the jurisdictional provision relating to private employees.[2/] In short, the provision granting district courts subject matter jurisdiction over Title VII suits, 42 U.S.C. §§ 2000e-5(f),

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2/ Thus, 42 U.S.C. §§ 2000e-16(c) and (d) provide that, within the specified time limits, an aggrieved employee or applicant "may file a civil action as provided in § 2000e-5 of this title . . . .," and that "the provisions of sections 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

is the same for both private and public employees. Accordingly, Zipes controls the case at hand because Zipes held that the provision granting jurisdiction to the district courts does not limit jurisdiction to those cases in which litigants have met the time limitations periods established in a separate, non-jurisdictional section of the statute.

Although the Fourth Circuit opinion was issued following this Court's ruling in Zipes, and although Zipes was called to the panel's attention,[3/] the panel opinion does not mention Zipes or indicate in any way that Zipes was considered. Its decision that the 30 day limit is jurisdictional is in conflict with Zipes.

3/ This case was briefed and argued before Zipes was issued. However, pursuant to F.R.App.P. Rule 29(j), counsel for petitioner brought Zipes to the panel's attention prior to oral argument in a letter dated March 29, 1982.

Similarly, by implication the panel opinion conflicts with Mohasco Corp. v. Silver, 447 U.S. 807 (1980). In Mohasco, a private Title VII plaintiff had failed to file a civil action within the 90 day time limit provided for private employees in 42 U.S.C. § 2000e-5(f)(1). Although this Court noted the defect, it did not dismiss for want of subject matter jurisdiction, as it would be bound to do if § 2000e-5(f)(1) were "jurisdictional." See Mitchell v. Maurer, 293 U.S. 237 (1934); City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973) (a court, whether trial or appellate, is obligated to inquire sua sponte into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it). Instead, the Court merely observed that the petitioner had not raised the respon-

dent's untimely filing as a defense. 447 U.S. at 811 n.9. Thus, Mohasco treated the analogous 90 day time limit for filing a private employee Title VII civil action as a statute of limitations subject to waiver, not as a jurisdictional prerequisite. The Zipes court approved the treatment by Mohasco of the 90 day filing period for private lawsuits as a statute of limitations.

The only possible distinction between the situation presented in Mohasco, and approved in Zipes, is that Mohasco dealt with the time limit for filing a civil action by private employees, while the case at hand concerns federal employees. However, as discussed earlier, the jurisdictional provision for both private and federal employees is the same: 42 U.S.C. § 2000e-5(f)(3). Moreover, this Court has recognized that Congress intended

federal employees to have the same access to federal courts as private employees. Chandler v. Roudebush, 425 U.S. 840 (1976). Indeed, Congress itself has evidenced its intention that the specific statutory provisions governing federal employees be interpreted in a manner parallel to and consistent with specific provisions involving private employees:

> Aggrieved [federal] employees or applicants [are to be accorded] the full rights available in the Courts as are granted to individuals in the private sector under Title VII.

S.Rep. No. 92-415, p. 16 (1971).

Therefore, since the Fourth Circuit's decision did not consider Zipes or Mohasco this Court should grant the petition for certiorari in order to achieve conformity with those decisions.

B. A Possible Conflict Exists Between This Court's Decisions in Zipes and Mohasco, and Brown v. GSA.

A further reason to grant certiorari is that there is a possible conflict between Zipes and Mohasco on the one hand, and Brown v. General Services Administration, 425 U.S. 820, 835 (1976), on the other. In Brown the Court affirmed the granting of a motion to dismiss because the federal employee did not file his civil action until 42 days after receiving notice of the final agency decision. In Brown the Court did not directly consider the question of whether timely filing was a jurisdictional prerequisite, nor were any equitable considerations presented. Consequently, the ruling seems to fall within the following comment in Zipes:

> Although our cases contain scattered references to the timely filing requirements as jurisdictional, the legal character of the requirement was not at issue in those cases, and as are more often in the same or other cases, we have referred to the provision as a limitations statute.

Zipes, 71 L.Ed.2d at 245.

Thus, while not dispositive of the issue here, Brown v. GSA adds considerable confusion to the case law and to the question of which Title VII time limits are covered by the holding of Zipes. The Court should therefore grant certiorari in order to resolve an apparent conflict between Zipes/Mohasco and Brown.

C. The Fourth Circuit's Holding That The 30 Day Limit of § 717(c) Is a Jurisdictional Prerequisite Creates a Conflict in the Circuits.

Following Zipes, every circuit except The Fourth that has considered the issue has concluded that meeting the various

time periods established in Title VII is not a jurisdictional prerequisite to suit. Since the Fourth Circuit decision dismissing this action is therefore in conflict with the decisions of other courts of appeals, this Court should grant certiorari in order to resolve the conflict.

In Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982), the Eleventh Circuit relied on Zipes to hold that the 30 day limit of § 717(c) is not jurisdictional but is subject to equitable tolling. In so holding, the court overruled Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir. 1977), cert. denied, 434 U.S. 985 (1977), stating, "The District Court relied on the former 5th Cir. holding in Eastdale [sic] v. Tennessee Valley Authority

[cite omitted] in ruling that § 2000e-16(c) was jurisdictional. That holding is no longer good law. Zipes v. Trans-World Airlines [citation omitted] . . ." Id. at 862. The Fourth Circuit decision here creates a conflict with the Eleventh Circuit's decision in Milam.

In the parallel context of a Title VII civil action filed by a non-federal employee, the Fifth and the District of Columbia circuits have both held that Zipes requires the conclusion that the applicable 90 day time limit of § 706(f)(1) is also not jurisdictional but is in the nature of a statute of limitations. See Whatley v. Board of Education, 673 F.2d 873, 879 n.5 (5th Cir. 1982); Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982).

The Fourth Circuit's decision in this case creates a conflict in the circuits concerning whether these related time periods for filing suit are jurisdictional prerequisites to suit. The Fourth Circuit decision also creates a conflict in the circuits over the proper interpretation of Zipes. Accordingly, this Court should grant certiorari to resolve these conflicts.[4/]

4/ Prior to Zipes, several circuits had reached opposite conclusions on the question of whether timely commencement of a civil action was a jurisdictional prerequisite to suit. Compare Allen v. United States, 542 F.2d 76 (3rd Cir. 1976) (consistently referring to § 717(c)'s 30 day time limit as a statute of limitations); Wiggins v. United States Postal Service, 653 F.2d 219 (5th Cir. 1981) (applying equitable principals to allow Wiggins, whose 30 days had long since passed, to file a timely action under § 717 without discussion of whether § 717(c)'s time limit is jurisdictional); Sessions v. Rusk State Hospital, 648 F.2d 1066, 1069 (5th Cir. 1981) (90 day time limit for suit against private party not

(fn.4 continued on next page)

II. THE FOURTH CIRCUIT'S DETERMINATION THAT THE EEOC'S DENIAL OF THE PETITION TO RECONSIDER DOES NOT CONSTITUTE FINAL AGENCY ACTION WITHIN THE MEANING OF SECTION 717(c) CONFLICTS WITH DECISIONS OF THIS COURT AND CREATES A CONFLICT IN THE CIRCUITS.

The Fourth Circuit held in this case that the EEOC's denial of petitioner's request for reconsideration by the full Commission of the Appeals & Review Board's decision does not constitute "final action"

(fn.4 continued from previous page)

a jurisdictional requirement); and Fox v. Eaton Corp., 615 F.2d 716, 718 & n.4 (6th Cir. 1980), cert. denied, 450 U.S. 935 (1981) with Gaballah v. Johnson, 629 F.2d 1191, 1198-99 & n.11 (7th Cir. 1980) (court considered late filing sua sponte and dismissed the claim for lack of subject matter jurisdiction) and Mahroom v. Hook, 563 F.2d 1369, 1374 (9th Cir. 1977). Both the Second and Tenth Circuits have left open for later decision the question of the availability of equitable tolling of the 90 day time limit for filing civil Title VII actions under § 706. See Ste.Marie v. Eastern R. Assn, 650 F.2d 395, 401 (2nd Cir. 1981); Cotrell v. Newspaper Agency Corp., 590 F.2d 836 (10th Cir. 1979). Thus, the pre-Zipes as well as the post-Zipes circuit cases are in conflict over whether the time limits for filing Title VII suits are jurisdictional prerequisites.

within the meaning of § 717(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c). The panel's decision conflicts with numerous decisions of this Court and other circuits holding that an administrative agency's denial of a timely petition for reconsideration is a "final action" within the meaning of analogous administrative schemes.

In American Farm Lines v. Black Ball Freight, 397 U.S. 532, 541, 25 L.Ed.2d 547 (1970) (holding that Interstate Commerce Commission has power to grant rehearing, even while the same case is pending in the district court) the Supreme Court ruled that:

> Unless Congress provides otherwise, '[w]here a motion for rehearing is in fact filed there is no final [agency] action until the rehearing is denied.'

American Farm Lines thus expressly contradicts the panel's ruling in the instant case that the EEOC's denial of plaintiff's petition for reconsideration was not a final action within the meaning of 42 U.S.C. § 2000e-16(c).

American Farm Lines relied on Outland v. Civil Aeronautics Board, 284 F.2d 224 (D.C. Cir. 1960). In Outland, Chief Justice (then Circuit Judge) Burger held that "when a motion for rehearing [of a final Agency action] is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the [Agency]." 284 F.2d at 228. Chief Justice Burger explained the circuit's ruling, made in the specific context of the Civil Aeronautics Board, as follows:

> The legislative history of 5 U.S. C.A. § 1009(c) indicates that it was adopted to achieve harmony with the holding in Levers v. Anderson, 1945, 326 U.S. 219, 66 S.Ct. 72, 90 L.Ed. 26 to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied . . . Section 1009(c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in such a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon.

284 F.2d at 227-228 (Emphasis added.)

Following Outland, the Supreme Court restated the general rule as "an administrative order is not 'final,' for the

purpose of judicial review, until outstanding petitions for reconsideration have been disposed of." Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 326 (1961) (Emphasis deleted.)[5/]

The Courts of Appeals have similarly adopted the reasoning of Outland. In B.J. McAdams, 551 F.2d 1112 (8th Cir. 1977), for example, the Eighth Circuit construed a statutory provision strikingly similar to the statute at hand:

5/ The dissent in Delta Airlines was even more emphatic: "Under every relevant reported decision, save one to be later noted, a timely motion for reconsideration, being an authorized and appropriate step in the proceeding, . . . prevents the 'proposed decision'--which, at that stage, is all it is--from becoming 'final.'" 367 U.S. at 339-41. (citations omitted). The single exception to "every reported decision" was Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 205 F.2d 449 (9th Cir. 1953), which was subsequently overruled by Samuel B. Franklin & Co. v. Securities and Exchange Commission, 290 F.2d 725 (9th Cir. 1961).

> On the entry of a final order reviewable under this chapter, the Agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within sixty days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

28 U.S.C. § 2344. 551 F.2d at 1114.

In B.J. McAdams, the plaintiff had received a "final order" from the Interstate Commerce Commission. Within sixty days of the entry of the order, the plaintiff petitioned the ICC for reconsideration. The petition was denied. Thereupon the plaintiff filed a petition requesting the ICC to find that the proceeding was one involving an issue of General Transportation Importance (GTI). At issue was whether the denial of a GTI petition constituted a "final order" within the meaning of Section 2344. The Eighth Circuit held that the filing of the GTI petition within 60 days of the

denial of the petition for reconsideration constituted a "final order," explaining its rationale as follows:

> Even though the filing of a GTI is discretionary and not required to exhaust administrative remedies, definite policy reasons reflect that judicial review should be postponed until a pending GTI petition has been ruled upon . . . Otherwise, parties would be required to file pro forma protective petitions for judicial review while GTI petitions are pending. The Court and the Agency would then possess simultaneous jurisdiction, creating the attendant possibility that Agency action on the GTI petition might render judicial review completely unnecessary. Moreover, denial of judicial review in the instant case would attribute prejudicial delay to the petitioner's effort in seeking discretionary Agency review. It is in the interest of judicial economy and agency responsibility to allow the Commission to reconsider its orders through a GTI proceeding, rather than to compel an applicant to invoke immediate judicial review.

551 F.2d at 1114-1115.

The Fourth Circuit's holding that the denial of a timely petition for reconsideration is not "final" agency action

therefore conflicts with decisions of this Court and other courts of appeal. Accordingly, this Court should grant certiorari to resolve the conflict.

III. THE FOURTH CIRCUIT'S CONCLUSION THAT A TIMELY FILING OF A PETITION FOR RECONSIDERATION DOES NOT TOLL THE 30 DAY PERIOD TO FILE A CIVIL ACTION UNDER SECTION 717(c) OF THE ACT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS CONSTRUING ANALOGOUS STATUTES.

The Fourth Circuit held that the 30 day time period for filing suit following receipt of the Appeals & Review Board's decision was a "jurisdictional" limitation not subject to equitable tolling. Accordingly, the circuit's decision rejected petitioner's contention that the timely filing of a petition for reconsideration tolled the time within which a civil action must be brought. The Fourth Circuit's decision places it in direct

conflict with decisions of other courts of appeal holding that time limits for seeking judicial review of final agency action operate as statutes of limitation and, further, that the filing of a timely petition for reconsideration tolls the statute.[6/] Consequently, this Court should grant certiorari to resolve the conflict.

In Samuel B. Franklin & Co. v. SEC, 290 F.2d 719, 725 (9th Cir. 1961), cert. denied, 368 U.S. 889 (1961), the Ninth Circuit carefully articulated a position contrary to the panel decision in the

---

6/ The panel decision also conflicts with Sperling v. United States, 10 E.P.D. ¶10,517 (D.N.J. 1975) (holding that a complaint was timely filed if filed within 30 days after the Civil Service Commission (predecessor to the EEOC) dismissed a timely petition to reopen and reconsider).

instant case:

> the legislative history of [the predecessor to the Administrative Procedures Act] convinces us that that section was intended to mean only that it was not necessary to file a petition for rehearing in order to be eligible to obtain judicial review. We now hold that the timely filing of a petition for Agency reconsideration does toll the thirty-day period for appeal to this court and that an appeal taken within sixty days from the termination of the petition for reconsideration by the Agency is timely.

209 F.2d at 725. See also Lloyd v. U.S. Department of Labor, 637 F.2d 1267, 1274 (9th Cir. 1980) (holding that under 19 U.S.C. § 2322(a), which provides for judicial review within sixty days after notice of final determination, "administrative reconsideration tolls the time until the reconsideration is decided whence the 60 day period runs."); Tiger International, Inc. v. Civil Aeronautics Board, 554 F.2d 926, 931 n.10

(9th Cir. 1977) (in a ruling dealing with 49 U.S.C. § 1486(a), the Court held that "when a motion for rehearing or reconsideration of an [administrative] order is made in the proceeding before the CAB, time for filing the petition to review that order does not begin to run until the CAB acts on the motion").

The Ninth Circuit has been joined in the view that the filing of a timely petition for reconsideration tolls the statutory time for filing a civil action by the District of Columbia Circuit, Pennsylvania v. ICC, 590 F.2d 1187, 1192-96 (D.C.Cir. 1978); Montship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C.Cir. 1961) (holding that the provision of 5 U.S.C.A. § 1034, which specifies a sixty day period in which a party aggrieved by a final order of the Maritime

Board may seek judicial review, permits the sixty-day period to begin after the Board has acted upon a motion for reconsideration); the Second Circuit, State of New York v. United States, 568 F.2d 887, 892-93 (2nd Cir. 1977) (holding that where the agency denied a petition for reconsideration for 3 out of 4 interrelated decisions, the time for judicial review of the decisions did not run until disposition of the pending reconsideration hearing); the Fifth Circuit, Ecee, Inc. v. Federal Energy Regulatory Commission, 611 F.2d 554, 555 (5th Cir. 1980); and the Eighth Circuit, B.J. McAdams, Inc. v. ICC, 551 F.2d 1112 (8th Cir. 1977). Each of these decisions places other circuit courts in conflict with the Fourth Circuit on the question of whether the statutory time periods for

seeking judicial review of administrative decisions are tolled by the timely filing of a petition for reconsideration. Accordingly, Supreme Court review is necessary to resolve the conflict in the courts of appeal.

Arguably, the cases relied upon by petitioner might be distinguished on the basis that these decisions deal with the statutory time for filing for judicial review, rather than the time for filing a lawsuit. However, this difference has no legal significance for the purposes of the present case. Plaintiff relies on these cases for their interpretation of what constitutes "final" agency action, and for the effect ascribed to the filing of a petition for reconsideration of the agency's action. Petitioner contends

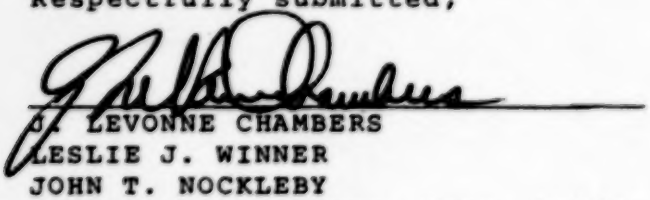
that there is no reason that the words "final action" in Title VII, 42 U.S.C. § 2000e-16(c), should be interpreted differently than courts have interpreted the words "final action" in these other statutes.

Since the Fourth Circuit's decision--holding the 30 day limit to be jurisdictional, and therefore not subject to tolling by the timely filing of a petition for agency reconsideration--conflicts both with decisions of this Court and with decisions of other circuits interpreting similarly-worded statutes, this Court should grant certiorari to resolve the conflicting interpretations.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Fourth Circuit Court of Appeals and the judgment should be reversed.

Respectfully submitted,



J. LEVONNE CHAMBERS
LESLIE J. WINNER
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt, Wallas,
Adkins & Fuller, P.A.
951 South Independence Boulevard
Charlotte, North Carolina 28202
Counsel for Petitioner

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2084

BETTY J. BIRCH,

Appellant,

v.

JOHN LEHMAN, Secretary of
UNITED STATES DEPARTMENT OF
THE NAVY,

Appellee.

Appeal from the United States District Court, for the Eastern District of North Carolina, at New Bern. F. T. Dupree, Jr., District Judge.

Argued: April 2, 1982 Decided: May 5, 1982

Before WINTER, Chief Judge, MURNAGHAN and SPROUSE, Circuit Judges.

SPROUSE, Circuit Judge. Betty Birch appeals the district court's dismissal of her civil rights action brought against the Secretary of the Navy pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. Finding her contentions to be without merit, we affirm.

The United States Navy Regional Medical Center (NRMC) at Camp LeJeune, North Carolina, dismissed Birch from her position as librarian in December, 1976, following charges of poor work performance. Prior to her dismissal Birch had filed a formal administrative complaint, claiming that she had been denied several benefits because of her sex. She continued to pursue administrative remedies following her dismissal, and on April 23, 1979, NRMC informed her that several of the issues she had raised would receive further consideration, but that others, including that of her dismissal, had been rejected. She was informed that this was NRMC's final decision with respect to the rejected issues and was advised that she could appeal to the Equal Employment Opportunity Commission (EEOC) within 15 days of the final decision or directly to the

district court within 30 days. A third option -- appeal to the EEOC followed by a civil action in district court within 30 days of the EEOC decision -- also was explained to her. Birch had been informed of these rights to appeal on several other occasions prior to the April 23 letter.

Birch appealed to the EEOC on May 7, 1979, and received that agency's decision on October 23, 1980, which held that the Navy had improperly rejected several discrimination allegations involving benefits, but that the rejection of the issue of her dismissal had been proper. The EEOC decision contained the following language:

> Pursuant to 29 C.F.R. 1613.282, the appellant is hereby notified that this is the Commission's final decision and that appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar

days of receipt of this decision.[1] In the same letter, both the appellant and the NRMC were notified that the Commission, in its discretion, could reopen and reconsider any previous decision. The NRMC was required to make any request for reopening within 30 days, but there was no time limit placed on Birch, who could petition for reopening at any time. On November 20, 1980, Birch requested the EEOC to reopen her case. That request was rejected on May 18, 1981,[2] because she failed

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[1]The 30-day time limit is set forth in 42 U.S.C. 2000e-16(c), which provides in part:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit . . .an employee . . .may file a civil action as provided in section 2000e-5 of this title . . .

[2]Birch received the Denial of Request to Reopen on May 21, 1981.

to meet the criteria for reconsideration set forth in 29 C.F.R. 1613.25 (1981), which allows reopening when "new and material evidence is available that was not readily available when the previous decision was issued." Birch filed a civil action in district court on June 17, 1981, more than eight months after her receipt of the EEOC's final decision of October 23, 1980. The district court dismissed her complaint because it had not been timely filed.

Birch now argues that there was no "final action" by the EEOC until she was notified of the denial of her request for reopening and that she had 30 days from that date to file her district court action.

We disagree. Accepting appellant's position would mean that no decision by the EEOC could be regarded with certainty as a "final action" since a plaintiff could revive his

claim at any time, merely by requesting reconsideration. Such a result would render the statutory 30-day requirement meaningless. The "final action" by the EEOC[3] was its denial of Birch's appeal, which she received on October 23, 1980, and she was required to file her appeal to the district court within thirty days from that time. The fact that she made her request for reopening within thirty days of October 23 does not alter this result. Birch was clearly notified in the decision received October 23, 1980, that such decision was final, and that any reconsideration of that decision was entirely in the discretion of the EEOC. The judgement is, therefore, affirmed.

AFFIRMED.

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[3]The appeal function of the Civil Service Commission was transferred to the Equal Employment Opportunity Commission by § 3 of the 1978 Reorganization Plan ¶1, 43 Fed. Reg. 19807.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-2084

Betty J. Birch, Appellant,

versus

John Leighman, Secretary of United States Department of the Navy, Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Sprouse with the concurrence of Judge Winter and Judge Murnaghan.

For the Court,

/s/ William K. Slate, II

CLERK

FILED

JUN 16 1982

U.S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

BETTY J. BIRCH,

Plaintiff,

VS.

JOHN LEHMAN, Secretary, United States Department of the Navy,

Defendant.

NO. 81-44-CIV-4

O R D E R

F I L E D

OCT 22 1981

J. RICH LEONARD, CLERK
U.S. DISTRICT COURT

This is a civil rights action in which plaintiff alleges that she was discriminated against because of her sex during her employment as the librarian at the United States Navy Regional Medical Center at Camp LeJeune, North Carolina. The action is presently before the court on defendant's motion to dismiss for lack of subject matter jurisdiction.

The motion is based upon an asserted failure to file this action within thirty days of receipt of the final decision of the Equal Employment Opportunity Commission on

plaintiff's employment discrimination charge. Plaintiff received the final EEOC decision on October 23, 1980. That decision stated that ". . . this is the Commission's final decision and . . . appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision." Within that thirty-day period, plaintiff pursuant to a procedure outlined in the decision filed a request that the EEOC reopen the case and reconsider the decision. On May 21, 1981 plaintiff received the EEOC's decision denying the petition for reconsideration, and this action was filed within thirty days of that denial. The denial of the petition for reconsideration stated in reference to the earlier decision that "that decision is the final decision in this matter . . .

The appellant may have a right to file a civil action in the appropriate United States District Court within the time limitations set forth in the final decision on the appeal." (Emphasis added.) See Exhibit 1 to Affidavit of Betty J. Birch.

Plaintiff contends that the decision received on October 23, 1980 established the right to request a reconsideration as an additional administrative step, from which it was reasonably inferred that the thirty-day time period would be tolled by filing such a request. It is further contended that the juxtaposition in the final decision of notice of the thirty-day time period and notice of a right to request reconsideration creates uncertainty regarding when the EEOC's action will be considered final, and that the government should be bound by the ambiguity. Finally, plaintiff

contends that the plaintiff could not reasonably have predicted a statutory interpretation that the petition for reconsideration would not toll the thirty-day period because she relied on pre-existing case law to the contrary.

Precisely these issues were recently addressed by Judge MacKenzie of the Eastern District of Virginia in Crane v. Hidalgo, No. 80-1090-N (E.D.Va., Aug. 4, 1981). Judge MacKenzie held that the filing of a request for reconsideration does not toll the running of the thirty-day period, and that the notice of a right to sue in the final decision is not ambiguous or confusing. This court concurs. Plaintiff was clearly notified of the finality of the EEOC decision. The notice of right to request a reopening of the case leaves such reconsideration entirely in the discretion of the EEOC and

implies that reconsideration will be granted only in unusual circumstances. Furthermore, the denial of the request for reopening refers again to the previous decision as the "final" one and refers to the earlier thirty-day period as the time within which the charging party might bring a civil action. An analogy to the Federal Rules of Civil Procedure is instructive, for a pending motion to alter or amend a judgment pursuant to Rule 59 or for relief from judgment pursuant to Rule 60 does not affect the finality of the judgment.

Each of the cases relied upon by Judge MacKenzie for the conclusion that the thirty-day period may not be extended by filing a request for reopening might be distinguished on its facts from the present case, for here plaintiff has not pursued "fictitious avenues of review," Chickillo v. Commanding Officer, Naval Air Engineering Center,

406 F.Supp. 807, 809 (E.D.Pa. 1976), aff'd, 547 F.2d 1159 (3d Cir. 1977), or filed requests to reopen long after the thirty-day period has expired. Hofer v. Campbell, 581 F.2d 975, 977 (D.C.Cir. 1978); Clark v. Goode, 499 F.2d 130, 132 (4th Cir. 1974). Plaintiff has not attempted to revive a stale claim nor to "mock the thirty-day limitation." Clark v. Goode, supra, 499 F.2d at 134. Nevertheless, the time periods established in Title VII may not be disregarded by the court. E.g., Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir.), cert. denied, 434 U.S. 985 (1977).

For these reasons, the court concludes that this action was not filed within the applicable thirty-day period and that defendant's motion must be allowed. Accordingly, the action is dismissed.

SO ORDERED.

/s/ F. T. DUPREE, JR.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 19, 1981.

I certify the foregoing to be a true and correct copy of the original.

J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina

By /s/ (illegible)
Deputy Clerk

CIV 32
(7/63)

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

CIVIL ACTION FILE No. 81-0044-CIV-4
NEW BERN DIVISION

BETTY J. BIRCH

vs.

JOHN LEIGHMAN, SECRETARY OF UNITED STATES DEPARTMENT OF THE NAVY

JUDGMENT

F I L E D
OCT 22 1981

J. Rich Leonard, Clerk
U. S. District Court

This action came on for (hearing) before the Court, Honorable F. T. Dupree, Jr. Chief , United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged the Court concludes that this action was not filed within the applicable thirty-day period and that the defendant's motion to dismiss must be

be allowed. Accordingly, the action is dismissed.

FILED AND ENTERED THIS 22ND DAY OF OCTOBER 1981, AT NEW BERN, N. C.

cc:

U. S. Attorney
Eastern District of North Carolina
P.O. Box 26897
Raleigh, North Carolina 27611

David E. Kirkpatrick
Trial Attorney
Office of the General Counsel
Litigation Division
Bldg. A-67, Naval Station
Norfolk, Virginia 23511

J. LeVonne Chambers
Suite 730, East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202

Dated at New Bern, North Carolina, this 22nd day of October, 1981.

J. RICH LEONARD
CLERK OF COURT

BY /s/ (illegible)
Deputy Clerk

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Docket Number: B01781011

Discrimination Complaint
Appeal of: Betty Birch
Agency: Dept. of the Navy
Final Decision Date: 9/3/80

Ms. Betty Birch
1005 Daniel Drive
Jacksonville, North Carolina 28540

Dear Ms. Birch:

Enclosed please find the final decision of the Equal Employment Opportunity Commission in the discrimination complaint appeal referred to above.

Sincerely,

/s/ Nestor Cruz/LLC
Nestor Cruz
Director, Office of
Review and Appeals

Enclosure

cc: Chairman
Employee Appeals Review Board
Department of the Navy
801 N. Randolph Street, Rm. 720
Arlington, Virginia 22203

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Betty J. Birch, Appellant	)	
v.	)	Appeal No. B01781011
United States Department of the Navy	)	

DECISION

INTRODUCTION

This is an appeal from the final agency decision which rejected appellant's complaint alleging sex discrimination (female) respecting the terms and conditions of her employment and her eventual termination. Appellant brought this equal employment opportunity complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. The appeal was accepted for decision by the Commissioners of the Equal Employment Opportunity Commission in accordance with the provisions of EEOC Order No. 960 dated January 2, 1979, as amended.

BACKGROUND

Appellant, a Librarian, GS-9, filed a sex (female) discrimination complaint against the agency on September 20, 1976. On September 27, 1976, the agency rejected the complaint for lack of specificity. Upon appeal of that rejection by appellant, the complaint was remanded to the agency by the Civil Service Commission to secure additional information from appellant and to allow her to clarify her allegations. During the pendency of her complaint, appellant was terminated by the agency. As a consequence thereof, she wrote to the Civil Service Commission alleging that her termination was discriminatory and a further act of harassment by the agency. On remand, appellant submitted a forty-one (41) page affidavit from which the agency concluded that she raised the following allegations of sex discrimination:

1) not issued of a civilian identification card; 2) denied assistance to run her unit; 3) obligated to type; 4) not allowed to attend professional staff meetings; 5) denied a reserved parking space; 6) issued job performance standards; 7) warned about inadequate performance; and 8) harassed by being verbally assaulted, and given letters of caution, warning and reprimand. Of the above listed allegations, only the fourth (4th), fifth (5th), and the verbal assaults part of the eighth(8th) allegation were accepted by the agency for processing. The remaining allegations were rejected because: 1) allegations one (1) and the letter of caution part of allegation eight (8) concerned matters over which the agency lacked control; 2) allegations two (2), three (3), six (6), seven (7), and the letter of reprimand portion of allegation

eight (8) were rejected because they concerned matters previously adjudicated in a grievance proceeding; and 3) other allegations or issues raised by appellant in her affidavit constituted new matter and were therefore untimely (this apparently included the matter of appellant's termination).

Appellant was advised of the finality of the agency's decision as regards the rejected issues and appeals therefrom.

ANALYSIS AND FINDINGS

The applicable provisions of the Equal Employment Opportunity Commission's regulations governing rejection of complaints found at 29 C.F.R. §1613.215 provide in part:

> [t]he head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations

> in a complaint which are not within the purview of [Title VII] or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. 29 C.F.R. §1613.215.

Based on the above provision, we must conclude that the agency improperly rejected the allegations dealing with the rejection of her identification card and the letter of caution as concerning matters over which the agency lacked control. A rejection based on the ground stated by the agency is tantamount to a decision on the merits and is not authorized by 29 C.F.R. §1613.215, above.

The agency's rejection of other allegations raised by appellant on the ground that they constituted matter previously adjudicated in a grievance proceeding was also improper.

Appellant is entitled to pursue independently both a grievance proceeding and a Title VII action. An adverse finding in the grievance-arbitration proceeding is not res judicata in the subsequent Title VII action, but may be admitted as evidence and accorded such weight as is deemed appropriate. Alexander v. Gardner-Denver Co., 315 U.S. 36 (1974). Therefore, considering the distinctive nature of a Title VII action and the comprehensive scheme for relief thereunder (see Brown v. General Services Administration, 425 U.S. 820 (1976)), the agency erroneously rejected allegations two (2), three (3), six (6), seven (7), and part of eight (8) because they were allegedly previously adjudicated in a grievance proceeding.

We, however, agree with the agency's determination that allegations concerning appellant's termination constituted new matter

and were untimely filed. The Equal Employment Opportunity Commission's regulations require, at 29 C.F.R. §1613.214(a)(1), that the complainant bring the matter causing him to believe he has been discriminated against to the attention of the EEO Counselor within thirty (3) days of its occurrence. We can not conclude, based on the record as a whole, that appellant's non-compliance with 29 C.F.R. §1613.214 (a)(1)(i) was justified, particularly since appellant did not show that she was unaware of this requirement. Myles v. Schlesinger, 436 F.Supp. 8 (E.D. Pa. 1977); Ettinger v. Johnson, 410 F.Supp. 519 (E.D. Pa. 1976).

CONCLUSION

Based on the record as a whole, the final agency decision is affirmed in part and reversed in part and the matter is remanded to the agency for further proceedings consistent with this decision.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. §1613.282, the appellant is hereby notified that this is the Commission's final decision and that appellant has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. Section 1613.235(a). The agency's attention is directed to 29 C.F.R. Section 1613.235(b) for time limitations on agency requests to reopen.

FOR THE COMMISSION:

/s/ Treva McCall
Acting Executive Officer
Executive Secretariat

9/3/80
DATE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF REVIEW AND APPEALS
2401 E Street, N.W.
Washington, D.C. 20506

May 18, 1981

Betty J. Birch
1001 Daniel Drive
Jacksonville, North Carolina 28540

Docket No. 05 81 0088

Dear Ms. Birch:

Enclosed please find the final decision of the Equal Employment Opportunity Commission in the discrimination complaint appeal referred to above.

Sincerely,

/s/ Nestor Cruz
Nestor Cruz, Director
Office of Review and Appeals

Enclosure

cc: Department of Navy
Chairman, Employee Appeals Review Board
801 N. Randolph St., Room 720
Arlington, VA 22203

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

IN THE MATTER OF THE REQUEST TO REOPEN BY BETTY J. BIRCH	REQUEST NO. 05810088

DENIAL OF REQUEST TO REOPEN

Betty J. Birch (hereinafter referred to as appellant) filed a request on November 20, 1980, that the Equal Employment Opportunity Commission reopen and reconsider its decision in Betty J. Birch v. Department of the Navy, Appeal No. B01781011, dated September 3, 1980.

EEOC Regulation 29 C.F.R. Sec. 1613.235 sets forth the criteria for reopening a previous decision of this Commission. Under the Regulation, the Commissioners may, in their discretion, reopen and reconsider any previous decision if the party requesting reopening and reconsideration submits written evidence or argument which

tends to establish one or more of the prescribed criteria.

Appellant requested reopening on the basis that the agency was not prejudiced by her failure to follow "the letter" of EEOC Regulation 29 C.F.R. Sec. 1613.214(a)(1)(i) requiring contact with an agency equal employment opportunity counselor within 30 calendar days of the effective date of a personnel action. In an affidavit attached to the request to reopen, appellant also stated that on December 16, 1976 (two days after the effective date of her termination), she was informed by an employee in an EEOC district office that, with regard to her subsequent termination, she need only supplement her formal appeal already filed with the Civil Service Commission.

The Commission has reviewed the request of the appellant to reopen the decision in Appeal No. B01781011, and the entire record in this case. The Commission finds after reviewing the record in this case that appellant's request does not tend to establish any of the criteria set forth in 29 C.F.R. Sec. 1613.235 for the following reasons.

EEOC Regulation 29 C.F.R. Sec. 1613.235 allows reopening when "new and material evidence is available that was not readily available when the previous decision was issued." Appellant in requesting reopening on that ground has failed to establish that the information provided was not readily available before the previous decision was issued. The evidence is the affidavit which the appellant could have executed at any time prior to the date of the previous decision. There is nothing in the

record showing external factors prevented her from doing so.

With respect to appellant's claim that waiving the time limits resulted in no prejudice to the agency, it should be noted that EEOC Regulation 29 C.F.R. Sec. 1613.214(a)(4) provides a mechanism for extending applicable time limits. Appellant's failure to seek relief under that Regulation cannot be disregarded. Having already filed one complaint with the agency, it is reasonable to assume she had knowledge of the operable procedures.

In view of the above, the request to reopen the Commission's decision in Appeal No. B01781011 is denied and that decision is the final decision in this matter. There is no further right of administrative appeal from a decision of this

Commission on a request to reopen.

NOTICE OF POSSIBLE RIGHT TO FILE A CIVIL ACTION

The appellant may have a right to file a civil action in the appropriate United States District Court within the time limitations set forth in the final decision on the appeal.

FOR THE COMMISSION:

5/5/81
Date

/s/ Treva McCall
Executive Officer
Executive Secretariat

Office - Supreme Court, U.S.
FILED
DEC 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-546

In the Supreme Court of the United States

OCTOBER TERM, 1982

BETTY J. BIRCH, PETITIONER

v.

JOHN H. LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARLEIGH D. DOVER
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QUESTION PRESENTED

Whether the district court properly dismissed petitioner's suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), because it was not filed within thirty days of her receipt of the final decision by the EEOC on her appeal from the rejection of her complaint by the Department of the Navy.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-546

BETTY J. BIRCH, PETITIONER

v.

JOHN H. LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the opinion of the district court (Pet. App. A8-A14) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1982, and the petition for rehearing was denied on June 16, 1982 (Pet. App. A1, A7). The petition for a writ of certiorari was filed on September 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner alleges that she was discriminated against because of her sex in connection with her employment and termination from employment at the United States Navy Regional Medical Center at Camp Le Jeune, North Carolina. The Department of the Navy rejected her claim of

discrimination in the termination because it was not timely filed, and other allegations of discrimination were rejected for this or other reasons (Pet. App. A21). The EEOC affirmed the Navy's rejection of the termination claim as untimely and remanded the other claims to the Navy for further proceedings (*id.* at A21-A24).

Petitioner received the final EEOC decision on October 23, 1980 (Pet. App. A9). That decision specifically stated that it was "the Commission's final decision" and that petitioner had "a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision" (*id.* at A25), as provided in 42 U.S.C. 2000e-16(c).[1]

Petitioner did not file a judicial action within that 30-day period. However, on November 20, 1982, petitioner filed a request that the EEOC reopen the case. EEOC regulations provide that the Commissioners may reopen and reconsider a decision if the requesting party presents new and material evidence that was not readily available when the decision was rendered, if the decision involves an erroneous interpretation of law or regulation or misapplication of established policy, or if the decision has broad precedential importance or is otherwise of an exceptional nature warranting the personal attention of the

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[1] 42 U.S.C. 2000e-16(c) provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section * * * an employee * * * if aggrieved by the final disposition of his complaint * * * may file a civil action as provided in section 2000e-5 of this title.

Commissioners. 29 C.F.R. 1613.235(a). The EEOC's decision in the case informed petitioner of her right to request a reopening (Pet. App. A25), but did not state that there was any particular time within which such a request had to be filed or that the filing of such a request would suspend the operation of the 30-day period for the filing of a judicial action.

Petitioner received the EEOC's denial of her request to reopen on May 21, 1981 (Pet. App. A9). That denial explicitly stated that the October 23, 1980 decision had been "the final decision in this matter," and it indicated that the time for filing a judicial action was governed by "the time limitations set forth in the final decision on the appeal" (Pet. App. A9-A10, A32). Petitioner filed this action on June 17, 1981 (*id.* at A5), more than eight months after her receipt of the EEOC's final decision on October 23, 1980. The district court dismissed the action as untimely, holding that "the filing of a request for reconsideration does not toll the running of the thirty-day period" and that "the notice of a right to sue in the final decision [was] not ambiguous or confusing" (Pet. App. A11). The court found an analogy to the Federal Rules of Civil Procedure, noting that although Rules 59 and 60 provides a method for obtaining an amendment of a judgment or relief from judgment, those Rules do not affect the finality of the judgment (*id.* at A12).

On appeal, petitioner argued that there was no final action by the EEOC until she was notified of the denial of her request for reopening and that she had 30 days from that date to file her district court action (Pet. App. A5). The court of appeals, however, affirmed the dismissal, stating that "[a]ccepting appellant's position would mean that no decision by the EEOC could be regarded with certainty as a 'final decision' since a plaintiff could revive his claim at any time, merely by requesting reconsideration. Such a result

would render the statutory 30-day requirement meaningless" (Pet. App. A5-A6).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 10-22) that the Fourth Circuit held that the 30-day time period for filing a civil action is a jurisdictional requirement that may never be tolled and that its holding therefore conflicts with decisions of this Court and other courts of appeals holding that the time periods for filing suit under Title VII are not jurisdictional. See, *e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, No. 78-1545 (Feb. 24, 1982). This argument does not warrant review, for the court of appeals did not discuss compliance with the 30-day filing period as a jurisdictional absolute.

The district court recited petitioner's arguments that she had complied with the 30-day requirement in this case: (1) that she could reasonably infer from the final decision received on October 23, 1980, that the suit-filing period would be tolled pending a request for reconsideration, (2) that the notice in the October 23 decision at least created an ambiguity on the point that should bind the government, and (3) that she reasonably believed on the basis of prior case law that the period would be tolled (Pet. App. A10-A11). The district court did not reject these equitable arguments out of hand, as would be expected if the court viewed compliance with the 30-day period as an inflexible jurisdictional requirement. Rather, the court noted its concurrence with the decision in *Crane* v. *Hidalgo*, No. 80-1090-N (E.D. Va. Aug. 4, 1981), which held that "the filing of a request for reconsideration does not toll the running of the thirty-day period, and that the notice of a right to sue in the final decision is not ambiguous or confusing" (Pet. App. A11).

The court's use of the word "toll" and its rejection on the merits of petitioner's equitable argument regarding the asserted ambiguity or confusion in the notice suggests a view of the provision as stating a period of limitations.

On appeal, petitioner argued that there was no final action by the EEOC for purposes of 42 U.S.C. 2000e-16(c) until she was notified of the denial of the request to reopen the case and that she had 30 days from that notification within which to file suit (see Pet. App. A5). The court of appeals limited its opinion to this argument and concluded that the notice received on October 23, 1980 was intended by the EEOC to be—and was, for purposes of the statutory suit filing period—the EEOC's "final action" in the matter (*id.* at A5-A6). The court of appeals did not discuss whether the 30-day requirement states a jurisdictional requirement. This issue therefore plainly does not warrant review.

2. Petitioner next contends (Pet. 23-30) that the court of appeals erred in determining that the final EEOC decision from which the 30-day period began to run was that received on October 23, 1980, not the denial of the request to reopen. In support of this argument, petitioner relies on four decisions: *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970); *CAB* v. *Delta Airlines*, 367 U.S. 316 (1961); *Outland* v. *CAB*, 284 F. 2d 224 (D.C. Cir. 1960); and *B.J. McAdams, Inc.* v. *ICC*, 551 F. 2d 1112 (8th Cir. 1977). All, however, arose under other statutory schemes, not under Title VII. Each, moreover, involved judicial review of an agency's administrative decision. The question of what constitutes "final action" in such a setting is governed by the Administrative Procedure Act, 5 U.S.C. 704.[2] See *CAB* v. *Delta Airlines, supra*, 367 U.S. at 327 n.9.

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[2]The cases cited by petitioner at pages 30-34 of her petition fell in the same category.

A federal employee's suit under Title VII, in contrast, does not seek judicial review of the agency's or the EEOC's determination on his charge of discrimination, as under the APA; Title VII provides for a de novo judicial trial on the complaint of discrimination. *Chandler* v. *Roudebush*, 425 U.S. 840, 851-852, 861-862 (1976). Because the employee does not seek judicial review of the administrative determination and is entitled to a trial de novo without regard to that determination,[3] there may often be little reason to postpone the commencement of judicial proceedings pending a petition for reconsideration of the EEOC's administrative decision on the complaint.

In addition, in this case, the EEOC, the agency charged with administration of the statute, understood that its decision received by petitioner on October 23, 1980 was its final decision or action on the matter; it so stated in that decision and notified petitioner of her right to file a civil action within 30 days. Although the notice informed petitioner that she could request a reopening on the basis of newly discovered evidence or for other reasons, it did not suggest that the suit-filing period would be tolled if such a request were made (Pet. App. A25-A26). Moreover, when the EEOC denied the request to reopen in May 1981, it reiterated that the decision received by petitioner on October 23, 1980 had been its final decision in the matter, stating that petitioner "may" have a right to file a civil action "within the time limitations set forth in the final decision on the appeal" (*id.* at A32). Petitioner, of course, did not do so. Thus, petitioner did not follow the prescribed procedures in this case.

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[3]Thus, under Title VII, the plaintiff may file a civil action after the passage of 180 days, whether or not the agency or the EEOC has taken any action on his administrative complaint. 42 U.S.C. 2000e-16(d). He is not limited to seeking judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The courts in Title VII cases also have held that the 30-day period runs from the date of the EEOC's decision on appeal, not the date of a denial of a request to reopen. In *Hofer* v. *Campbell*, 581 F. 2d 975, 977-988 (D.C. Cir. 1978), cert. denied, 440 U.S. 909 (1979), for example, the court of appeals specifically held that the 30-day time limit for filing suit under Title VII commenced with the adverse decision of the Civil Service Commission's Board of Appeals and Review,[4] and was not delayed until denial of the employee's request that the Commission reopen and reconsider the case. Accord: *Clark* v. *Goode*, 499 F. 2d 130 (4th Cir. 1974); *Chickillo* v. *C.O., Naval Air Engineering CTR.*, 406 F. Supp. 807 (E.D. Pa. 1976), aff'd, 547 F. 2d 1159 (3d Cir. 1977). See also *Canty* v. *Olivarez*, 452 F. Supp. 762 (N.D. Ga. 1978). As the court of appeals noted in *Clark*, accepting the argument that petitioner's time did not begin to run until the denial of her request for reopening would, in effect, deny finality to any decision of the EEOC.[5] It explained (499 F. 2d at 133-134):

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[4]The appeal function of the Civil Service Commission was transferred to the EEOC by Section 3 of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807.

[5]To the extent petitioner argues (Pet. 30-36) that the 30-day period for filing a judicial action was tolled pending the disposition of her request that the EEOC reopen the appeal, that claim is unavailing in the circumstances of this case. Twenty-eight of the 30 days elapsed between October 23, 1980, when petitioner received the decision of the EEOC on appeal, and November 20, 1980, when she filed her request to reopen. Even if the further running of the 30-day period was tolled pending the EEOC's consideration of her request to reopen, that period began to run again on May 21, 1981, when petitioner received the notice of the EEOC's denial of her request to reopen. Yet she did not file her civil action until June 17, 1981, some 27 days later. Even allowing for an intervening period of tolling, then, a total of 55 days elapsed before she filed a civil action.

> [A]n aggrieved claimant could revive at any time his claim, however stale, by the simple expedient of filing, as the plaintiff did in this case, a request to reopen. It would not matter that he may already have requested and been denied a reopening. Similarly, it would be of no moment that, after final action by the Commission either on his original claim or on his request to reopen, he had not filed suit within thirty days. That requirement could be frustrated merely by filing a new request to reopen, and when that was denied, suit could be filed. Such a request would thus mock the thirty-day limitation for the institution of the suit, incorporated in the statute, and would do violence to the obvious legislative purpose evident in the statute.

Petitioner has offered no answer to the force of this reasoning. Because there is no conflict with any decision of this Court or of any court of appeals concerning this procedural question under Title VII, further review is not warranted.

We have been informed by the EEOC that it is developing proposals to clarify further its regulations relating to the procedural requirements in federal sector Title VII cases. We have alerted the EEOC to the particular issue presented here so that it may be addressed in such a procedural revision as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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